

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

MISC. LAND APPLICATION NO. 50 OF 2021

(Arising from Misc. Land Appeal No. 6/2020 of the High Court Kigoma. Originating from District Land and Housing Tribunal for Kigoma in land Appeal No. 103/2018 before F. Chinuku – Chairperson. Original Land Case No. 1/2018 of Mkongoro Ward Tribunal)

**DAUD MOHAMED NKWAJE (Administrator of The Estate of The
Late Mohamed Nkwaje) APPLICANT**

VERSUS

JUMANNE CHIMPAYE RESPONDENT

RULING

18/7/2022 & 19/8/2022

L.M. Mlacha, J

The applicant, Daud Mahamed Nkwaje (Administrator of the Estate of the late Mohamed Nkwale) filed an application seeking a certificate on points of law to be considered by the Court of Appeal in an appeal against the decision of this court made in Miscellaneous Land Appeal No. 6 of 2020 (Matuma J). The application is made under section 47 (3) of the Land Disputes Court Act cap 216 R.E 2019 and Section 5(2) of the Appellant Jurisdiction Act, Cap 141 R.E. 2019. It is supported by the affidavit of Ignatius Kagashe. Annexed to the affidavit is a copy of the Notice of Appeal, a letter from Mr. Kagashe seeking certified copies of proceedings

and decision for appeal purposes, part of the proceedings of Mkongoro ward tribunal, the judgment of the District Land and Housing for Kigoma made in Land Appeal No. 103 of 2018 and its decree, the judgment of this court made in Miscellaneous Land Appeal No. 6/2020 (Matuma,J) and its decree. The points which are sought to be certified are in para 6 of the affidavit which reads:

1. That, whether in law, the High Court on second appeal could raise a new issue particularly the 2nd issue raised for determination of the appeal without affording the parties with the right to be heard.
2. That, in the light of evidence on record, whether in law, the High Court on 2nd appeal did not misdirect itself in the re-evaluation of evidence on record on crucial matters of the dispute particularly: -
 - a. Whether the suit shamba had been under Respondent's young brother Rashid Chimpaye's care and supervision since 1974 to 2018 when the dispute arose without his testimony as an important live witness.
 - b. Whether one part of the same suit shamba had not been sold to another person known as BALEGWA without encumbrances from

respondent, save the upper part of the shamba sold unto the Applicant.

3. Whether in law, the Respondent's claims over the suit shamba in 2018 having shifted therefrom in 1974 were in the absence of continuity of ownership/possession not time barred.
4. Whether in law, the respondent could reclaim the suit land as 'mahame' after 43 years of departure therefrom.

The respondent Jumanne Nchimbaye, on being served filed a counter affidavit in opposition sworn by Mr. Silvester Damas Sogomba. With leave of court hearing was done by written submissions. The applicant made a submission to show why he thinks that the points should be certified for determination by Court of Appeal. Counsel for the appellant submitted that much as this court had power to re-evaluate the evidence where the first appellate court did not perform that duty properly or failed to consider material issues in the case as was said in **Hassan Mzee Mfaume v. R** [1981] TLR 167 but that does not include raising new issues on the second appeal and deliberating on them without affording the parties the right to be heard. He went on to say that the respondent was the complainant at the ward tribunal and thus having the duty to prove his case, but this court

on a second appeal raised two issues, all relating to the applicant's claim of title and not the respondents claim of title and resolved them. Counsel did not see this as being correct. He referred the court **Charles Christopher Hamprey Kombe v. Kinondoni Municipality**, CAT Civil Appeal No. 81 of 2017 where it was said that failure to observe the parties' right to be heard of on a point raised suo mottu by the court meant breaking principles of natural justice. He argued the court to certify the first point.

Submitting in respect of the second point counsel said that the point is whether in law, the High Court a second appeal did not misdirect or un direct itself in the re-evaluation of the evidence on record on crucial factual and legal matters of the dispute leading to failure of justice on the part of the applicant. He there after referred the court to the four sub points as shown above and asked it to certify the second point.

On the third and fourth points, counsel submitted that while the first appellate court dealt with the question of limitation which can be raised any time of the proceedings, the High Court did not determine it despite the fact that on the facts before the court limitation was in evitable to be determined. He argued that failure to do so constitute a good ground to be determined by the Court of Appeal.

Submitting in reply, counsel for the respondent said that the application is devoid of merits and must be dismissed. He said that the applicant gave concocted evidence at the ward tribunal that he bought the suit land from the respondent's step father 43 years ago. This evidence was rejected by the ward tribunal who declared the respondent the lawful owner of the land. He said that it is not correct to say that the parties were not allowed to address the court on the second issue because the second issue depended on the first issue which was whether there was sufficient evidence adduced by the respondent/applicant that he purchased the disputed land from Ali Kebe'o while the second issue depended on the outcome of the first issue, whether there was sufficient evidence adduced by the applicant/Respondent to the effect that Ali Kebe'o had good title to the land to pass to him. He submitted that the framed issue was in favour of the applicant because he is the one who alleged to buy the land from the respondent's step father but failed to prove. He added that the second issue had no relevance after the applicant's failure to prove the first issue.

Counsel submitted that the High Court did not misdirect itself in the evaluation of evidence on the question whether the suit land had been under the respondent's young brother Rashidi Chimpaye's care and

supervision since 1974 up to 2018. He submitted that despite the absence of evidence from Mr. Rashidi Chimpaye but still there was good evidence from the applicant which made the High Court to decide the case in his favour as the applicant had no good evidence. He argued the court to be guided by the case of **Goodluck Kyando v. R** [2006] TLR 363 where it was said that every witness is entitled to credence and must be believed and his evidence accepted unless there are good cogent reasons for not believing him. He also referred the court to **Stanslaus Rugaba Kasusula and AG v. Fales Kabuye** [1982] TLR 388 where it was said that the trial court has to evaluate the evidence of each witness as well as their credibility and make a finding on the issues in dispute.

Counsel submitted that it was proper for the High Court to re – evaluate the evidence and confirm the decision of the ward tribunal. He went on to submit that the allegation that the suit was time barred is not worthy consideration by the Court of Appeal because the question was dealt properly by this court which said that the applicant had no any activity in the suit land in the period of respondent's occupation. He added that the applicant's submission is inconsistent with the principle of adverse possession as stated in **Registered Trustees of Holy Sisters v.**

January Kamil Shayo and 136 others, Civil Appeal No. 193/2010 (CA).

He submitted that even if the respondent shifted to the neighboring village (Bubango) but his shamba was not allocated to any other person. He added that the principle of adverse possession is not applicable where the applicant claims ownership by purchase. He must be a trespasser, he stressed. He argued the court to dismiss the application saying the applicant is misusing the court process for there is no point worthy determination by the Court of Appeal in this case. He went to say that leave to appeal is not automatic. It is within the discretion of the court to grant or refuse. The discretion must however be judiciously exercised. Adding that, as a matter of general principle, leave to appeal will be granted where the grounds of appeal raised issues of general importance or a novel point of law where the grounds establish a prima facie or an arguable appeal. And further that where the grounds of appeal are frivolous, vexatious or useless or hypothetical leave should not be granted. He referred the court to British **Broadcasting Corporation v. Erick Sikujua Ngimaryo**, Civil Application No. 138/2004 (CA) on these principles. Counsel made further reference to **Goldisten Mashinga (as Legal Representative of the estate of the Edna Jackson**

Mashingia) v. Maria Jackson and 2 others, Misc. Land Application No. 21/2021 (High Court of Moshi) on the same purpose.

I appreciate the research done by counsel and the strength of their pen. I had time to read the judgment of my brother Matuma J and the cited decisions. I accept that the principles cited by counsel for the respondent. They are the correct principles governing an application for leave. I may only add that where the court is convinced that leave should be granted, much as the applicant might have submitted a lot on the weaknesses of the judgment sought to be challenged, the court is not expected to make detailed discussions about the weaknesses of the judgment. In my view, it is enough if it will say that it has been convinced that there are good grounds or points for determination and list them. Things will be different where leave is refused in which case the court in my view, must say why it is refusing to grant the leave.

Having said so and guided by principles cited by counsel for the respondent in his submission, I have the view that the applicant have managed to convince me to certify the following points.

1. Whether in Law, the High Court sitting on a second appeal could raise an issue and decide a point suo mottu without affording the parties a right to be heard.
2. Whether the High Court sitting on second appeal was justified to re-evaluate the evidence adduced at the ward tribunal.
3. Whether in law the respondent who had left the land for 43 years could come back and reclaim it as his land of origin (Mahame)

The application is granted.

It is ordered so. No order for costs.




L.M. Mlacha

Judge

19/8/2022

Court: Ruling delivered. Right of Appeal Explained.




L.M. Mlacha

Judge

19/8/2022